FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 74-1106

UNITED STATES OF AMERICA,

Petitioner,

v.

GREGORY V. WASHINGTON,

Respondent.

ON A WRIT OF CERTIORARI TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE RESPONDENT

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Government may, consistent with the Fifth Amendment privilege against self-incrimination, use the compulsion of a judicial subpoena and the threat of contempt to compel an uncounseled putative defendant to give self-incriminating testimony before the grand jury that is deciding whether to indict him, without advising him of his Fifth Amendment rights

and obtaining from him, prior to his grand jury appearance, a voluntary, knowing and intelligent waiver of those rights.

2. Whether subpoenaing an uncounseled putative defendant to the grand jury that is deciding whether he should be indicted and interrogating him under oath before that grand jury without telling him that he might be indicted by that very grand jury and that he has a right not to answer to grand jury's incriminating questions violates the Due Process Clause.

COUNTERSTATEMENT

Respondent accepts petitioner's Statement as substantially accurate and complete. It is only necessary here to emphasize a few facts which respondent considers critical to the disposition of this case.

1. A police officer and two prosecutors doubted the truthfulness of respondent's innocent explanation of the presence of a stolen motorcycle discovered in his van. (A. 36, 48, 57).

2. Respondent was subpoenaed to the grand jury by the Government for the purpose of having the grand jury decide, after hearing his testimony, whether he should be indicted for the theft of the motorcycle. (A. 48, 57-58).

3. The prosecutor who subpoenaed respondent to the grand jury did not tell him that he was a suspect in the case, that he might be indicted by the very grand jury he was being ordered to appear before, that he had a right not to answer the grand jury's incriminating questions or that he should (or might wish to) consult with a lawyer prior to this grand jury appearance. In fact, it appears that this prosecutor told respondent only that he was needed "as a witness" in the grand jury's ongoing investigation involving his two friends

who had been arrested in his van at the time the stolen motorcycle was discovered. (A. 45).

4. Respondent is legally indigent. He appeared at the grand jury without a lawyer.

5. The prosecutor conducting the grand jury had reviewed the case and expected that the grand jury might disbelieve respondent's testimony and indict him for the theft of the motorcycle. Nevertheless, this prosecutor did not advise respondent of any rights prior to taking him before the grand jury. (A. 50, 58).

6. After taking respondent inside the grand jury room and swearing him as a witness, the prosecutor, for the first time, gave respondent a modified version of the so-called "*Miranda* warnings." The prosecutor told respondent that he "was not under arrest" but was "just [there] by way of subpoena." (A. 3). The prosecutor told respondent that he had a "right to remain silent" and that anything he said could be used against him "in court." (A. 4). The prosecutor did *not* tell respondent that he was a suspect or that anything he said could be used against him "in the grand jury." The prosecutor did *not* tell respondent what a grand jury was or that there was a substantial likelihood that the grand jury would, based on his own testimony, indict him and thereby launch a criminal prosecution of him in connection with the theft of the motorcycle. When asked if he wanted a lawyer respondent said "No, I don't think so." (A. 4). Respondent acknowledged the warnings and proceeded to answer questions before the grand jury, all of which, as it turned out, were incriminating.

7. Based solely on his own testimony and the fact that a stolen motorcycle was discovered in a van being operated by two others but registered to him, the grand jury indicted respondent for grand larceny and receiving stolen property. (A. 71).

8. Two lower courts have held that respondent was a suspect or putative defendant at the time of his compelled appearance before the grand jury that indicted him and that he did not voluntarily, knowingly and intelligently waive his Fifth Amendment privilege against self-incrimination.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question presented by this case is whether an uncounseled putative defendant who is subpoenaed to the grand jury for the express purpose of having the grand jury decide, after hearing his testimony, whether or not to indict him is to be treated like an ordinary witness, bound by the rule that a witness who fails to assert his Fifth Amendment privilege at the time he makes incriminating disclosures may not later claim that those disclosures were "compelled" within the meaning of the Fifth Amendment. The Government does not argue that putative defendants subpoenaed to the grand jury do not have a Fifth Amendment privilege to assert, since, by definition, their compelled testimony will incriminate them. Indeed, the Government concedes that respondent had a right to refuse to answer every one of the grand jury's questions relating to the stolen motorcycle found in his van. The Government argues only that respondent, who was indigent and appeared at the grand jury without counsel, was not entitled to be told about that right; according to the Government, if the prosecutor is fortunate enough to compel self-incriminating testimony from uncounseled putative defendants who are ignorant of their rights, he should not be deprived of his fruits as long as such testimony was "voluntarily" given, whether or not it was the product of a voluntary, knowing and intelligent waiver of the Fifth Amendment privilege.

Respondent contends that this Court's analysis last term in *Garner v. United States*, 424 U.S. 648 (1976), is dispositive of the issues presented by this case. While a witness under compulsion to make disclosures ordinarily must put the Government on notice by claiming the privilege or he will not later be heard to assert that he was "compelled" to incriminate himself, the Government may not deliberately seek to avoid the burdens of the adversary system by compelling self-incriminating disclosures from putative defendants who it knows in advance will incriminate themselves by making such disclosures and then attempt to fall back on the rule that the putative defendant's failure to claim the privilege bars its later assertion. This is particularly true where, as here, the object of the governmental compulsion to incriminate is a putative defendant who is indigent and is therefore not represented by counsel.

Having stated what respondent's position is, we should be quick to state what respondent's position is not. Respondent does not contend that every witness subpoenaed to testify before a grand jury has a right to refuse to testify or a right to warnings. It is the clear duty of every citizen to assist the police and grand juries in their investigation of crime and to obey subpoenas to testify. *United States v. Dionisio*, 410 U.S. 1, 9-10 (1973); *Blair v. United States*, 250 U.S. 273 (1919). Thus, if a witness whom the Government is not investigating and has no reason to suspect of criminal involvement in the matters under investigation is subpoenaed to the grand jury, he has no right not to answer questions or to a lawyer and, of course, no right to warnings of these non-existent rights. If such a witness does give incriminating testimony without claiming the privilege, no exclusionary rule would prevent the Government from indicting the witness or using his grand jury testimony at trial.[1]

[1] It is respondent's position that as soon as the uncounseled non-target witness begins to incriminate himself before the grand jury, the prosecutor would then have an obligation to stop questioning the witness and advise him of his rights outside the presence of the grand jury.

Nor does respondent contend that putative defendants or target witnesses may under no circumstances be subpoenaed to testify before a grand jury, although there is some support in the cases for such a contention. See *Jones v. United States*, 342 F.2d 863, 867-68 (D.C. Cir. 1964) (*en banc*); *Powell v. United States*, 226 F.2d 269, 274 (D.C. Cir. 1955); cf. *United States v. Scully*, 225 F.2d 113, 116 (2nd Cir. 1955), *cert. denied*, 350 U.S. 897; but see *United States v. Dionisio*, *supra*, 410 U.S. at 10 n.8. For purposes of this case respondent assumes, *arguendo*, that a target witness or putative defendant can be subpoenaed to testify before the grand jury and be interrogated if, before appearing in front of the grand jury, the witness is fully and adequately advised of his Fifth Amendment rights and voluntarily, knowingly and intelligently waives those rights.

But at least when the grand jury has focused on a person as a potential target for indictment, and subpoenas him for the express purpose of deciding, after hearing his testimony, whether or not to indict him, that person is compelled to incriminate himself within the meaning of the Fifth Amendment, and the Government may not use his compelled self-incriminating testimony against him at trial absent proof of a voluntary, knowing and intelligent waiver. Two lower courts have held that respondent did not validly waive his privilege when he testified at the grand jury without counsel and under the compulsion of a judicial subpoena, because he was never told that *he* was a target of the grand jury's inquiry or that *he* might be indicted based on his own testimony, and because what little advice he was given regarding his Fifth Amendment rights was not given until he was inside the grand jury room and sworn as a witness.

Respondent submits that these findings by the two lower courts should not be disturbed. No purported

waiver can meet the test of "an intentional relinquishment or abandonment of a known right or privilege," *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), if the uncounseled putative defendant is not told and does not know that he is a target for indictment. Nor can any purported waiver be considered truly voluntary if the uncounseled putative defendant is not given any advice regarding his Fifth Amendment privilege until he is sworn as a witness and face to face with the grand jurors, who sit simultaneously as his triers of fact and potential accusers. Moreover, requiring the putative defendant to assert the privilege in front of the grand jury itself, thereby inviting the grand jury to infer his guilt solely from his exercise of his Fifth Amendment rights, runs afoul of the doctrine of *Griffin v. California*, 380 U.S. 609, 614 (1965), and other cases which preclude attaching a price to the exercise of the privilege.

Whether or not giving an uncounseled putative defendant his Fifth Amendment advice outside the presence of the grand jury should always be required as an essential prerequisite of an effective waiver, the Court of Appeals and the Superior Court were certainly correct in considering the time and place of the advice, along with the failure to advise respondent that he was a target of the grand jury, as factors to be weighed in determining whether respondent's decision to testify before the grand jury constituted a voluntary, knowing and intelligent waiver of his Fifth Amendment privilege. The Government has not argued that respondent did validly waive his privilege, arguing instead that absent a specific claim of the privilege by an uncounseled putative defendant, no waiver of any kind is required, much less a voluntary, knowing and intelligent waiver. Respondent submits that if the power of the prosecutor, through the grand jury, to gather his evidence from the mouth of the accused in the form of sworn testimony, compelled by subpoena and backed up by the power of

contempt, is to be sanctioned at all by this Court, then a strict waiver requirement is the very minimum safeguard necessary to guarantee that an uncounseled putative defendant who elects to testify does so with a meaningful understanding of the consequences of giving up his constitutional rights.

Although the Due Process Clause was not expressly relied on by the Court of Appeals in suppressing respondent's grand jury testimony, the Government has also argued that the practice of subpoenaing uncounseled putative defendants to the grand jury and interrogating them under oath without telling them anything at all about their Fifth Amendment rights, much less the fact that they may be indicted by that very grand jury, does not offend due process. Respondent argues in Part II, *infra*, that even if such procedures do not offend the prosecutor's sense of fair play, they are offensive to any less parochial standard of due process. The Government's position is especially curious since apparently government attorneys conducting federal grand juries routinely administer warnings to those witnesses whom they consider to be targets of the grand jury. Pet. Br. 19. Thus, the only substantial interest the Government seems to be asserting here is the right to decide for itself which uncounseled target witnesses it will warn and which ones it will require to fend for themselves. In any event, respondent contends that the Constitution, as interpreted by this Court, has dictated the terms under which the prosecutor may gather his evidence from the mouth of the accused, and those terms do not include keeping the accused in the dark about his most vital constitutional rights.

Finally, under an analysis premised on either the Self-Incrimination Clause or the Due Process Clause, acceptance of respondent's position will not, as petitioner contends, seriously impede the effective functioning of the grand jury or deprive the grand jury of

evidence obtainable only from persons who may themselves be involved in or at the fringes of crime. If a target witness truly wants to testify, with full appreciation of the consequences, presumably he would not be deterred by even the most elaborate Fifth Amendment advice. Obviously, informing people of their constitutional rights will lead, in some cases, to the exercise of those rights. But even in such cases the prosecutor and the grand jury are not without their resources. If, after being advised of his rights, a target witness indicates an unwillingness to testify, the Government can still obtain whatever information the witness might have about others involved in criminal enterprise. Congress has provided for precisely this situation by authorizing the Government to grant compulsory immunity to the witness, after which his testimony is properly compellable. 18 U.S.C. §6002, *et seq.* Moreover, even after a grant of immunity the Government can still seek to prosecute the witness himself, since this Court has held that the "use and derivative use" immunity conferred by 18 U.S.C. §6002 is a constitutionally adequate substitute for the privilege against self-incrimination. *Kastigar v. United States*, 406 U.S. 441 (1972). Thus, to the extent that the grand jury must rely on witnesses who are themselves involved in crime but who are needed by the grand jury because of the information they may have about others, the grand jury will not, as a result of a decision in this case adverse to the Government, be deprived of this source of evidence.

In sum, the only testimony the Government will lose as a result of a decision favorable to respondent in this case is compelled testimony from uncounseled putative defendants who would not testify if they understood both that they did not have to testify and the reasons why they might intelligently decide not to testify. Respondent submits, however, that such testimony is at the very core of the Fifth Amendment protection and

it is testimony which, in our accusatorial system, was never intended to be made compellable by the power of the Government.

ARGUMENT

I.

THE GOVERNMENT VIOLATED RESPONDENT'S RIGHT AGAINST SELF-INCRIMINATION WHEN IT KNOWINGLY COMPELLED HIM TO GIVE SELF-INCRIMINATORY TESTIMONY BEFORE THE GRAND JURY CONSIDERING WHETHER TO INDICT HIM WITHOUT FIRST OBTAINING FROM HIM A VOLUNTARY, KNOWING AND INTELLIGENT WAIVER OF THAT RIGHT.

The respondent in this case was subpoenaed to the grand jury and interrogated there under oath for the sole purpose of determining whether, after hearing his testimony, the grand jury would indict him for the substantive offenses about which he testified. Prior to his grand jury appearance, Mr. Washington was suspected by both the police and the prosecutor of having been involved in the theft of a stolen motorcycle that was discovered in his van, which was occupied at the time by two friends of Mr. Washington but not by him. Knowing that Mr. Washington was likely to incriminate himself if he testified and that the grand jury would then decide whether to indict him based on that testimony, the prosecutor subpoenaed him to the grand jury which was then investigating the case. Mr. Washington appeared without counsel, was placed under oath and answered the prosecutor's questions before the grand jury. He was subsequently indicted by that grand jury

for grand larceny and receiving stolen property. The question presented by this case is whether under these circumstances Mr. Washington was compelled to incriminate himself within the meaning of the Fifth Amendment; if so, this Court has consistently held that the Government may not use his compelled grand jury testimony at trial unless it can satisfy a heavy burden of demonstrating that, prior to testifying under compulsion, he voluntarily, knowingly and intelligently waived his Fifth Amendment rights.[2]

Beginning from the premise that a witness must ordinarily claim the privilege at the time he makes disclosures to the Government or he will not later be held to have been "compelled" to incriminate himself within the meaning of the Fifth Amendment, the Government argues that it may freely use respondent's grand jury testimony against him at trial (presumably in its case-in-chief) because respondent, who appeared at the grand jury without counsel, did not claim the privilege before testifying.[3] According to the Government, the principles of *Miranda v. Arizona*, 384 U.S. 436 (1966), which require law enforcement authorities to obtain from a suspect in custody a knowing and intelligent waiver of Fifth Amendment rights before they may

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[2] A similar question was presented last term in *United States v. Mandujano*, 425 U.S. ——, 96 S.Ct. 1768 (1976). The respondent in that case, however, sought to suppress his allegedly false grand jury testimony in a prosecution for perjury, and all eight Justices participating in the decision agreed that whatever Fifth Amendment rights the respondent had at the time of his appearance before the grand jury, the Constitution did not require suppression of his allegedly false testimony in a prosecution for perjury based on that testimony. Although six Justices joined opinions which addressed the question presented by this case in *dictum*, there was no opinion for a majority of the Court on that question.

[3] The government also argues that it does not violate the Due Process Clause to subpoena a target witness and interrogate him under oath at the grand jury without telling him that he is a target of the grand jury. The due process aspects of this case are discussed in Part II, *infra*, p. 42.

interrogate him, do not apply to interrogation of suspects before the grand jury pursuant to subpoena for two reasons: (1) interrogation before the grand jury is not as coercive as custodial interrogation by the police; and (2) to the extent that such interrogation is coercive, it is no more coercive of "target witnesses" or "putative defendants" than it is of ordinary witnesses whom the Government does not suspect of any criminal involvement.[4]

Respondent submits that the correct analysis, which answers dispositively all of the Government's arguments, was spelled out by this Court last term in *Garner v. United States, supra. Garner* elucidates the distinction – which runs through all of this Court's Fifth Amendment decisions – between governmental compulsion to disclose information and governmental compulsion to incriminate oneself. Where mere disclosure of information is involved, persons who feel they are incriminated by the disclosure must notify the Government by claiming the privilege or they will not later be held to have been "compelled" to incrimate themselves within the meaning of the Fifth Amendment. But where the Government compels disclosures from a witness who it knows will incriminate himself by making such disclosures, the Government is already on notice that its processes are compelling self-incrimination and the burden rests on the Government to demonstrate a valid

[4] The problem of how to define a "target witness" or "putative defendant" is not present here, since respondent was, by any definition, a target of the grand jury which indicted him. As the ensuing discussion in text will show, however, the concept is self-defined by the proper analysis; when the government knowingly seeks by compulsion to obtain self-incriminating testimony, the witness against whom such compulsion is exerted is entitled to the full protection of the Fifth Amendment, including the requirement that, absent a grant of immunity, he must validly waive the privilege before he may be compelled to make incriminating disclosures. Like petitioner, but for somewhat different reasons, respondent uses the terms "target witness," "putative defendant" and "potential defendant" interchangeably throughout this brief. See note 37, *infra*.

waiver of the privilege before it can use the compelled disclosures against the defendant at trial. As this Court explained in *Garner*, in order to find a violation of the Fifth Amendment privilege there must be not only governmental compulsion to disclose information, but the compulsion must be knowingly directed at a particular suspect or class of suspects to disclose self-incriminating information; if both of these elements coexist, as they plainly do in this case, the Government may not use the compelled disclosures against the defendant at trial absent proof of a valid waiver by the defendant prior to making the disclosures.

A. When The Government Uses The Compulsion Of A Judicial Subpoena And The Threat Of Contempt To Obtain Self-Incriminating Testimony From An Uncounseled Witness Whom The Grand Jury Is Considering Indicting And Who The Government Knows In Advance Is Likely To Incriminate Himself By Giving Such Testimony, It Has "Compelled" That Witness To Incriminate Himself Within The Meaning Of The Fifth Amendment.

The petitioner in *Garner v. United States, supra,* claimed that the prosecution should not have been permitted to use against him at his criminal trial on gambling charges certain disclosures he was "compelled" to make on his Form 1040 income tax returns, which all taxpayers are required to file. The Government argued that because Garner had filed the tax returns without asserting his privilege, he had not been compelled to incriminate himself within the meaning of the Fifth Amendment. This Court's starting point was the proposition that persons who file their income tax returns are not "volunteers"; though they may claim the privilege with respect to specific disclosures, they may

not refuse to file altogether and then defend against a resulting criminal prosecution on Fifth Amendment grounds. *United States v. Sullivan*, 272 U.S. 259 (1927). Thus Garner was compelled to file the returns containing the disclosures which the Government ultimately used against him at his criminal trial.

The Court next addressed the Government's principal contention that by failing to claim the privilege at the time he filed his returns, Garner had lost the benefit of the privilege.[5] It is at this point that the Court set forth the analysis which controls this case:

> These decisions stand for the proposition that, *in the ordinary case*, if a witness under compulsion to testify makes disclosures instead of claiming the privilege, the Government has not "compelled" him to incriminate himself.
>
> > "The Amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of

[5] The Court initially made it clear that, despite some ambiguous language in some of the older cases, the mere failure to claim the privilege does not operate as a waiver; if incriminating testimony is compelled within the meaning of the Fifth Amendment, only a voluntary, knowing and intelligent waiver will suffice as proof that the privilege was in fact waived.

> This conclusion has not always been couched in the language used here. Some cases have indicated that a nonclaiming witness has "waived" the privilege, see, *e.g., United States ex rel. Vajtauer v. Commissioner of Immigration*, 273 U.S. 103, 113 (1927). Others have indicated that such a witness testifies "voluntarily," see *e.g., Rogers v. United States*, 340 U.S. at 371. Neither usage seems analytically sound. The cases do not apply a "waiver" standard as that term was used in *Johnson v. Zerbst*, 304 U.S. 458 (1938), and we recently have made clear that an individual may lose the benefit of the privilege without making a knowing and intelligent waiver. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 222-227, 235-240, 246-247 (1973). Moreover, it seems desirable to reserve the term "waiver" in these cases for the process by which one affirmatively renounces the protection of the privilege, see, *e.g., Smith v. United States*, 337 U.S. 137, 150 (1949). 424 U.S. at 654 n. 9.

> the privilege, he must claim it or he will not be considered to have been 'compelled' within the meaning of the Amendment." *United States v. Monia, supra*, 317 U.S. at 427 (footnote omitted).

In their insistence upon a claim of privilege, *Kordel* and the older witness cases reflect an appropriate accommodation of the Fifth Amendment privilege and the generally applicable principle that governments have the right to everyone's testimony . . . . Despite its cherished position, the Fifth Amendment addresses only a relatively narrow scope of inquiries. *Unless the Government seeks testimony that will subject its maker to criminal liability*, the constitutional right to remain silent absent immunity does not arise. An individual therefore properly may be compelled to give testimony, for example, in a *noncriminal* investigation of himself . . . . Unless a witness objects a government *ordinarily may assume that its compulsory processes are not eliciting testimony that he deems to be incriminating.* Only the witness knows whether the *apparently innocent* disclosure sought may incriminate him, and the burden appropriately lies with him to make a timely assertion of the privilege. If, instead, he discloses the information sought, any incriminations properly are viewed as not compelled.

In addition, the rule that a witness must claim the privilege is consistent with the fundamental purpose of the Fifth Amendment – the preservation of an adversary system of criminal justice . . . . *That system is undermined when a government deliberately seeks to avoid the burdens of independent investigation by compelling self-incriminating disclosures.* In areas where a government cannot be said to be compelling such information, however, there is no such circumvention of the constitutionally mandated policy of

> adversary criminal proceedings. 424 U.S. at 654-656 (emphasis added; footnote and citations omitted).

Given the general rule that a witness must ordinarily claim the privilege or he will not be held to have been "compelled" to incriminate himself, the Court held that Garner's failure to claim the privilege at the time he filed his tax returns was fatal to his argument. Along the way, the Court rejected Garner's contention that the waiver requirement of *Miranda* should be applied to his case so as to prevent the Government from using the disclosures on his tax returns against him at trial absent a showing that he had knowingly and intelligently waived his privilege. In rejecting this contention, the Court observed:

> It is evident that these [coerced confession] cases have little to do with disclosures on a tax return. The coerced confession cases present the entirely different situation of custodial interrogation . . . . It is presumed that without proper safeguards the circumstances of custodial interrogation deny an individual the ability freely to choose to remain silent . . . . At the same time, *the inquiring government is acutely aware of the potentially incriminatory nature of the disclosures sought. Thus, any pressures inherent in custodial interrogation are compulsions to incriminate, not merely compulsions to make unprivileged disclosures.* Because of the danger that custodial interrogation posed to the adversary system favored by the privilege, the Court in *Miranda* was impelled to adopt the extraordinary safeguard of excluding statements made without a knowing and intelligent waiver of the privilege. 424 U.S. at 657 (emphasis added; citations omitted).

Respondent submits that the Court's analysis in *Garner* controls this case; interrogation of uncounseled

target witnesses under oath before the grand jury pursuant to subpoena is not "the ordinary case." Here, unlike in *Garner*, the "inquiring government" uses its compulsory process to "seek[ ] testimony that will subject its maker to criminal liability." Here, unlike in *Garner*, the Government may not "assume that its compulsory processes are not eliciting testimony that [the target witness] deems to be incriminating," and the disclosures sought are not "apparently innocent" but are deliberately and specifically intended to provide a basis for determining whether a criminal prosecution should be initiated. By the same token, like the situation in *Miranda* but unlike *Garner*, "the inquiring government is acutely aware of the potentially incriminatory nature of the disclosures sought" and the compulsions of the judicial subpoena and the threat of contempt are "compulsions to incriminate and not merely compulsions to make unprivileged disclosures."

Properly understood, *Garner* reveals why this Court's decision last term in *Beckwith v. United States*, 425 U.S. 341 (1976), heavily relied on by the Government here, is consistent with respondent's position and is plainly distinguishable from this case. Before discussing *Beckwith*, however, it is necessary first to discuss briefly *Miranda* itself. As we shall show, this Court's analysis in *Garner* also reveals that, far from being an extension of the principles recognized in *Miranda*, respondent's position follows *a fortiori* from an application of those principles to the facts of this case.

Long before *Miranda*, it had been held that persons who were compelled by subpoena to testify in formal judicial or quasi-judicial proceedings were protected by the Fifth Amendment privilege. At least since *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892), the Fifth Amendment privilege has been available to a witness who is brought to the grand jury by subpoena to testify there under oath and under the threat of contempt.

The threshold question presented in *Miranda* was whether the protections of the privilege applied *also* to custodial interrogation by the police, where there is no formal compulsion to testify.

In answering that question, the Court in *Miranda* traced the roots of the privilege against self-incrimination back to the oldest reported English cases. 384 U.S. at 458-466. The Court recognized that with the exception of some of the coerced confession cases,[6] the Fifth Amendment privilege had previously been held applicable exclusively in situations where there was some formal compulsion to testify. To determine whether the principles underlying the privilege apply as well to situations involving the "informal compulsion" to testify inherent in police questioning, the Court looked to the various techniques regularly employed by police and law enforcement authorities to obtain confessions, focusing not only on the use of actual force and violence which had in the past rendered certain confessions inadmissible under the Due Process Clause, but also on the more subtle forms of psychological coercion. 384 U.S. at 448-456. Examination of these coercive police tactics led the Court to conclude that "all the principles embodied in the privilege [against compelled self-incrimination] apply to informal compulsion exerted by law enforcement officers during in-custody questioning." 384 U.S. at 461. Building on this premise, the Court held that persons subjected to the "informal compulsion" of police custodial interrogation were entitled to the same Fifth Amendment protections

[6] *Bram v. United States*, 168 U.S. 532, 542 (1897). See also *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 347 (1963); *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921); *Powers v. United States*, 223 U.S. 303, 313 (1912). Although these cases suggested that coerced confessions are inadmissible because they violate the defendant's privilege against compelled self-incrimination, most of the cases which had held such confessions inadmissible had been decided under the Due Process Clauses of the Fifth and Fourteenth Amendments. The privilege against self-incrimination was not made applicable against the states until *Malloy v. Hogan*, 378 U.S. 1 (1964).

as persons subjected to the formal compulsion of a subpoena to testify under oath.

Where, as here, there is a formal compulsion to testify, however, the "informal compulsion" recognized in *Miranda* becomes irrelevant.[7] The question in the grand jury context, as *Garner* makes clear, is whether the compulsion is simply a compulsion directed at the general population to make disclosures or whether it is, instead, a compulsion to incriminate.

A related question was presented in *Miranda*. In *Escobedo v. Illinois*, 378 U.S. 478 (1964), this Court had held that once a person has become the focus of a criminal investigation, he could not be interrogated by the police without the assistance and advice of his lawyer.[8] In *Miranda* two years later, the Court backed away somewhat from its total reliance on the "focus" rationale of *Escobedo*, and merged that concept into its definition of "custodial interrogation." Thus, in defining "custodial interrogation" as questioning which occurs "after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way, the *Miranda* court added "[t]his is what we meant in *Escobedo* when we spoke of an investigation which had focused on the accused." 384 U.S. at 444 and n. 4. Later in the *Miranda* opinion the

[7] The Court in *Garner* used the term "witness" to describe all those from whom the Government compels disclosures and defined the concept largely in terms of the formal compulsion to testify:

> The term "witness" is used herein to identify one who, at the time disclosures are sought from him, is not a defendant in a criminal proceeding. The more frequent situations in which a witness' disclosures are compelled, subject to Fifth Amendment rights, include testimony before a grand jury, in a civil or criminal case or proceeding, or before a legislative or administrative body possessing subpeona power. 424 U.S. at 652 n. 7.

[8] *Escobedo* relied primarily on the Sixth Amendment, but there were distinct Fifth Amendment overtones. 378 U.S. at 483, 485, 491. The Sixth Amendment rationale was not followed in *Miranda*, and the concept of a Sixth Amendment right to counsel prior to formal charges was rejected in *Kirby v. Illinois*, 406 U.S. 682 (1972).

Court was again careful to distinguish those persons who required special Fifth Amendment protections from those who did not, pointing out that "[g]eneral on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement." 384 U.S. 477-478.

What the Court held in *Miranda*, then, is that when the police are not engaged in "general questioning of citizens in the fact finding process" but are questioning suspects on whom a criminal investigation has focused, the interrogation may not go forward unless the suspect is fully advised of his Fifth Amendment rights, including a right to counsel incident thereto, and voluntarily, knowingly and intelligently waives those rights. The Court concluded that persons who are being questioned because they themselves are suspected of criminal involvement have a special need to be carefully advised of their Fifth Amendment rights; at the same time, the dictates of our adversary system of criminal justice demand of the interrogating government a special duty to provide such advice and to secure from the suspect a truly informed waiver of those rights before it may interrogate.

This Court's holding last term in *Beckwith v. United States, supra,* is not to the contrary. In that case this Court held that Beckwith was not entitled to the safeguards of the privilege erected in *Miranda* because it did not find "informal compulsion" in the non-custodial setting in which Beckwith was interrogated. There was little doubt that a criminal tax investigation had focused on Beckwith at the time he was interrogated, but he was not interrogated in custody – or anything resembling custody – and he was expressly told, in any event, that he did not have to answer the I.R.S. investigators' questions.

Beckwith clearly does not control this case, as petitioner contends. Pet. Br. 35. It is true that both respondent and Beckwith had become the focus of criminal investigations. Thus, in the words of the Court in *Garner,* "any compulsions were compulsions to incriminate, not merely compulsions to make unprivileged disclosures." 324 U.S. at 657. The difference between the two cases is that respondent was "compelled" and Beckwith was not.[9]

Garner is, in some respects, *Beckwith's* opposite. In *Garner* the compulsion was there in the duty to file income tax returns; but that was a duty imposed equally on all taxpayers and not just those who were suspected of criminal activity. Thus, there was no governmental compulsion operating on Garner to incriminate himself as an illegal gambler at the time he filed his tax returns; viewed another way, the focus of suspicion had not been cast on Garner at the time he was compelled to file his income tax returns, and accordingly, the values underlying our adversary system were in no way imperiled.[10]

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[9] *Beckwith* is further distinguishable from this case because the I.R.S. agents who questioned Beckwith in his home and office expressly advised him not only that he did not have to answer any incriminating questions and could speak to a lawyer before responding, but also that their purpose in questioning him was to inquire into possible *criminal* tax violations relating to his federal income tax liability for the years 1966 through 1971. Although this warning did not comply perfectly with *Miranda*, it provided Beckwith with a reasonably adequate basis on which to exercise intelligently his Fifth Amendment rights.

[10] The absence of any focus on Garner as an illegal gambler also distinguished that case (and *United States v. Sullivan, supra*) from the Court's earlier decisions in *Marchetti v. United States*, 390 U.S. 39 (1968), and *Grosso v. United States*, 390 U.S. 62 (1968). The tax forms which the petitioners in those cases were prosecuted for refusing to file were required only of those engaged in illegal gambling activities. The mere filing of the required forms would have incriminated the petitioners, as would any requirement of a contemporaneous claim of the privilege as a basis for refusing to file. Thus, those petitioners were "compelled" to incriminate themselves in a way that Garner was not, and their failure to claim the privilege was not a bar to their later assertion of the privilege as a defense to a criminal prosecution for failing to file the required forms.

Reading *Miranda*, *Garner* and *Beckwith* together, the rule of law which governs this case clearly emerges: when the Government seeks to avoid the burdens of the adversary system by compelling self-incriminating disclosures (either formally, as in this case, or "informally," as in *Miranda*) from a person who it knows will incriminate himself by making such disclosures, it may not use those disclosures (or evidence derived therefrom) in evidence against the defendant at his criminal trial unless it can satisfy a heavy burden of demonstrating that the defendant voluntarily, knowingly and intelligently waived his Fifth Amendment rights before being subjected to the compulsion which gave rise to the disclosure. If there is governmental compulsion to disclose, but it is not compulsion to self-incriminate, the rule does not apply. *Garner v. United States, supra.* Likewise, if the Government seeks incriminating disclosures from a suspect or class of suspects but does not use compulsion to extract such disclosures, the rule also does not apply. *Beckwith v. United States, supra.* But where, as here, the Government uses the compulsion of the judicial subpoena to obtain from an uncounseled "putative defendant's" own mouth the incriminating evidence to be used to indict and prosecute him, the rule must apply with full force. "[A] defendant's right not to be compelled to testify against himself at his own trial might be practically nullified if the prosecutor could have required him to give evidence against himself before a grand jury." *Michigan v. Tucker,* 417 U.S. 433, 441 (1974). If the right of the Government to build its case by compelling its evidence from the mouth of the accused is to be sanctioned at all by this Court, the adversary system and the values reflected by the Fifth Amendment privilege require nothing less than proof of a voluntary, knowing and intelligent waiver before the Government may use such evidence against the defendant at trial.

From what has already been said, the Government's two principal contentions can be disposed of rather quickly. Petitioner argues first, as it did in *Mandujano*, that the Fifth Amendment principles enunciated in *Miranda* have no application to grand jury target witnesses because interrogation before the grand jury is not as coercive as custodial interrogation by the police. But, as has been shown, the question of whether the police station is more or less coercive than the grand jury – a matter on which there is much room for disagreement[11]

[11] Whether interrogation under oath before the grand jury is in fact less intimidating or coercive than custodial interrogation by the police seems speculative at best. Anyone who has appeared as a witness pursuant to the command of a subpoena, sworn an oath to tell the truth and been subjected to cross-examination would have difficulty accepting the Government's assertion as empirical fact. The grand jury is, after all, an exceedingly private affair. The grand jury for the Superior Court for the District of Columbia meets in the bowels of the courthouse, just off the boiler room. Aside from the witness, who usually sits isolated in a chair which serves as a make-shift witness stand, the only persons in the grand jury room are a court reporter, a prosecutor, and between sixteen and twenty-three grand jurors who, at least in the case of target witnesses, sit at once as both triers of fact and potential accusers. The target witness subpoenaed to testify and interrogated under oath is unlikely to find this a particularly friendly audience. Indeed, in this very case, the trial court and the Court of Appeals suppressed respondent's grand jury testimony in part because he was advised of his Fifth Amendment rights for the first time *inside* the grand jury room. Both courts concluded that the atmosphere inside the grand jury room was not conducive to a truly voluntary waiver of the privilege, since claiming the privilege, in front of the grand jurors, would have run the risk that they would infer his guilt solely from his refusal to testify. See discussion *infra*, pp. 36-41.

Moreover, in *Miranda* itself the Court was careful to define "custodial interrogation" each time as questioning by the authorities initiated "after a person had been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444, 477, 478. While the grand jury subpoena may not be an arrest or a seizure within the meaning of the Fourth Amendment, *United States v. Dionisio, supra,* 410 U.S. at 10, there can be no doubt that the subpoenaed witness is deprived of his freedom in a significant way. In the case of an ordinary grand jury witness, this fact alone may not be sufficient to justify or require Fifth Amendment safeguards. But when the witness is a target of the grand jury and thus the very purpose of the grand jury's interrogation is to extract from the witness enough inculpatory testimony to form the basis for an indictment, the compulsion of the subpoena and the duty to obey it carry with them the need for zealous protection of the witness' Fifth Amendment rights.

– is completely irrelevant to a finding of compelled self-incrimination in the grand jury context. The coercive interrogation techniques discussed at length in the *Miranda* opinion were not the *sina qua non* for a finding of Fifth Amendment compulsion that petitioner would make them, but were necessary in that case, where there was no formal compulsion to testify, only to get the Court to the point where it begins in this one. Unlike suspects interrogated by the police, putative defendants interrogated under oath before the grand jury pursuant to subpoena are, in the truest sense, exposed to "the cruel trilemma of self-accusation, perjury or contempt." *Murphy v. Waterfront Comm'n.*, 378 U.S. 52, 55 (1964).[12] See also, *Michigan v. Tucker, supra,* 417 U.S. at 445. Thus, the significance of *Miranda* for this case is not the extension of the Fifth Amendment privilege into the police station – the issue

[12]Indeed, virtually all the values reflected in the Fifth Amendment privilege identified by the Court in *Murphy v. Waterfront Comm'n, supra,* are present when the Government uses the compulsion of a judicial subpoena to obtain self-incriminatory testimony from a putative defendant before the grand jury:

> The privilege against self-incrimination "registers an important advance in the development of our liberty–'one of the great landmarks in man's struggle to make himself civilized.' " *Ullmann v. United States*, 350 U.S. 422, 426. It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load." 8 Wigmore, Evidence (McNaughton rev., 1961), 317; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life," *United States v. Grunewald*, 233 F.2d 556, 581-582 (Frank, J., dissenting), rev'd 353 U.S. 391; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent." *Quinn v. United States*, 349 U.S. 155, 162. *Murphy v. Waterfront Comm'n.*, 378 U.S. at 55 (footnote omitted).

which divided the Court[13] – but the requirement that statements obtained from an uncounseled suspect under compulsion to respond are inadmissible against him at trial unless, prior to making such statements, the suspect was fully advised of his Fifth Amendment rights and voluntarily, knowingly and intelligently waived them.

This Court's analysis in *Garner* also answers dispositively the Government's other main contention that "a witness's answers before the grand jury are no more likely to be compelled (in a constitutionally significant sense) if he is suspected of involvement in criminal activity of the sort the grand jury is investigating than if he is not." Pet. Br. 22, 28. While is is true that the compulsion of the subpoena and the threat of contempt operates on both target and non-target witnesses, it is not true that the status of the witness has no constitutional significance. With respect to ordinary witnesses, the inquiring Government is not knowingly and intentionally *seeking* incriminating disclosures. For all the Government knows, such witnesses are wholly innocent of any criminal conduct, and the burden rests fairly with the witness to apprise the Government of any claim that the "apparently innocent disclosure" he is being asked to make will incriminate him. Thus, respondent does not contend that the Constitution requires the Government to advise *all* grand jury witnesses of their rights before taking their testimony or that *ordinary* witnesses who make incriminating

[13]The dissents in *Miranda* objected strenuously to the extension of the privilege into the police station, but all of the dissenting Justices recognized the applicability of the privilege to the grand jury, where the formal compulsion of the subpoena and the oath have traditionally been held to "compel" testimony within the meaning of the Fifth Amendment. 384 U.S. at 510 (Harlan, J., dissenting); 384 U.S. at 526-527 (White, J., dissenting). See also *Michigan v. Tucker, supra,* 417 U.S. at 439-443; *Kastigar v. United States, supra,* 406 U.S. at 443-445.

disclosures but who fail to claim the privilege before testifying have been compelled to incriminate themselves within the meaning of the Fifth Amendment.

But, as we have already shown and as this Court recognized in *Garner*, target witnesses are different. As to them, the compulsion to disclose information operates as a compulsion to incriminate, and the Government knows full well that the disclosures it is compelling will incriminate the witness. Indeed, in many cases the very purpose of subpoenaing the target witness to the grand jury is to obtain from his own mouth the incriminating evidence necessary to indict and prosecute him. Such witnesses are "compelled" in a "constitutionally significant sense," and the values reflected in the Fifth Amendment which undergird our adversary system require proof of a voluntary, knowing and intelligent waiver before the Government may use against the accused at trial his own grand jury testimony taken at a time when the accused was not represented by counsel and was himself the target of the grand jury's investigation.

B. As Two Lower Courts Have Held, Respondent Did Not Validly Waive His Fifth Amendment Privilege Because He Was Not Adequately Advised Of His Rights Prior To His Appearance Before The Grand Jury And Because He Was Never Told, At Any Time, That The Prosecutor And The Grand Jury Had Focused On Him As A Target For Indictment.

Respondent Washington was subpoenaed by the Government to appear and give testimony before the grand jury so that the grand jury could decide, after hearing his testimony, whether he should be indicted and prosecuted for the theft of a stolen motorcycle

that was discovered in his van. Yet he was never advised, either by the prosecutor who issued him the subpoena or by the prosecutor conducting the grand jury, that he was a suspect or that he might be indicted if he answered the grand jury's questions. Nor was he told that he should (or might wish to) consult with a lawyer prior to his grand jury appearance.

Respondent appeared at the grand jury as ordered by the subpoena. Because he is legally indigent, he did not have a lawyer. The prosecutor conducting the grand jury had reviewed the case and had concluded that the grand jury might well disbelieve respondent's innocent explanation of the presence of the motorcycle in his van and indict him. (A. 57-58). Nevertheless, the prosecutor did not advise respondent of his Fifth Amendment rights prior to taking him inside the grand jury room and swearing him as a witness. Once he was in front of the grand jury and sworn as a witness, respondent was given a modified version of the so-called "*Miranda* warnings" from the form used by the local police officers for advising people whom they arrest. (A. 51, 62). However, instead of advising respondent that he was "under arrest," as printed on the form, the prosecutor told him "You are not under arrest. You're just here by way of subpoena." (A. 3).

The prosecutor then informed respondent that he had a right to a lawyer and a right to remain silent and that anything he said could be used against him "in court." (A. 4). At no time, however, either before being sworn or in the grand jury room itself, was he advised that he was a target for indictment or that anything he said could be used against him "in the grand jury." Nor did anyone tell respondent what a grand jury was, what the purpose of the grand jury's questions was or that there was a substantial possibility that the grand jury would, based on his own testimony, indict him in

connection with the stolen mototcycle.[14] Respondent acknowledged the warnings and proceeded to testify. He was subsequently indicted for grand larceny and receiving stolen property.

Having shown in Part IA, *supra*, that under this Court's decisions respondent was under compulsion to incriminate himself within the meaning of the Fifth Amendment, the only remaining question is whether respondent validly waived his Fifth Amendment rights when he testified at the grand jury without claiming the privilege. This Court has repeatedly held that the Fifth Amendment privilege is so fundamental to our adversary system and so inextricably bound up with the package of constitutional rights intended to provide the

[14] In *Jones v. United States*, 342 F.2d 863 (D.C. Cir. 1964) (*en banc*), the District of Columbia Circuit was faced with a question similar to the question presented by this case. In holding that the warnings given to the defendant in that case were not adequate to protect his Fifth Amendment rights, the Court said:

> No one told him, before he was taken to the grand jury, what a grand jury was or what his rights before it would be, although the committing magistrate and the police had told him in general terms that he need not "incriminate himself."
>
> * * *
>
> When Short was actually facing the grand jury it was too late for any warning to mean much. The warning the prosecutor gave him in the grand jury room would have been inadequate to protect his rights even if Short's presence had been voluntary. *The prosecutor told him he was "before the Grand Jury" but did not tell him on what business the grand jury was engaged. The prosecutor told him he need not answer questions and that answers could be used against him "at any future trial," but did not tell him the grand jury would use his answers to decide whether to indict him.* 342 F.2d at 869-870 (emphasis added).

The above quotation is from the four-judge plurality opinion in *Jones*. The other two judges in the six-judge majority agreed that taking the defendant before the grand jury and interrogating him under oath without counsel showed an extraordinary disregard of the defendant's "situation" and "customary practice," but did not agree with the other four judges in the majority that automatic dismissal of the indictment was necessarily required as a matter of constitutional law. 342 F.2d at 873 n. 18. See also *Powell v. United States*, 226 F.2d 269, 274 (D.C. Cir. 1955).

accused with a fair trial that only a voluntary, knowing and intelligent waiver will suffice as proof that the accused willingly gave up his right to silence. *Garner v. United States, supra*, 424 U.S. at 654 n.9; *Schneckloth v. Bustamonte*, 412 U.S. 218, 235-246 (1973); *Miranda v. Arizona, supra*, 384 U.S. at 475-476. The standard had its genesis in *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), where the Court held that the purported waiver (of counsel in that case) must manifest "an intentional relinquishment or abandonment of a *known* right or privilege." (emphasis added).

In suppressing respondent's grand jury testimony, two lower courts have held that under this standard respondent did not validly waive his Fifth Amendment privilege and attendant right to counsel prior to testifying at the grand jury because he was never told, and presumably did not know, that he was himself a potential defendant who might be indicted by the very grand jury whose questions he was answering. Both lower courts also expressed the view that the giving of such advice as was given only after respondent was already sworn and face to face with the grand jurors further undermined the validity of any purported waiver. (Pet. App. 3a; A. 70-71). Respondent submits that the decision of the Court of Appeals on this point (and that of the Superior Court) was correct and should be affirmed; the Government can not meet its "heavy burden" of demonstrating a valid waiver (*Miranda v. Arizona, supra*, 384 U.S. at 475) on a record which

plainly shows that the advice it gave respondent was the wrong advice, in the wrong place at the wrong time.[15]

1. With respect to the validity of a purported waiver in the absence of advice to the subpoenaed witness that he is a target for indictment by the very grand jury before which he is ordered to appear, petitioner frames the question as whether "the Self-Incrimination Clause [can] reasonably be held to require a 'putative defendant' warning on top of full *Miranda* warnings (or any warnings regarding the privilege)." Pet. Br. 39. Respondent submits that petitioner has turned the relevant question upside down. The real question is whether an uncounseled target witness who is told that he has a right not to answer questions can possibly exercise that right intelligently if he is not told any basis on which he might decide that it makes sense for him not to answer certain questions.

In the context of custodial interrogation by the police, the first warning a suspect is given is that he is under arrest or, if he has not been formally arrested, that he is under suspicion in connection with the

[15]Because petitioner does not accept the proposition that *any* waiver was required, it analyzes the Court of Appeals' decision on the failure to give a "target witness warning" and the failure to advise respondent of his rights out of the presence of the grand jury as if the Court of Appeals has held that these were independent constitutional entitlements, each being required by the Fifth Amendment. Having created this strawman, petitioner then proceeds to knock it down by arguing that the Constitution "does not require 'target' warnings or 'potential defendant' warnings" (Pet. Br. 38) and that "the Constitution . . . does not forbid the administration [of any required warnings] in the presence of the grand jury." Pet. Br. 53-54. What the Court of Appeals held, of course, was *not* that any specific warnings, or timing and location of any warnings, is itself required by the Constitution, but that any purported waiver of the Fifth Amendment privilege (which the Constitution does require) is not valid unless it is voluntarily, knowingly and intelligently made. The Court of Appeals (and the Superior Court) could not conclude that the Government had met its heavy burden of establishing such a waiver on the facts of this case.

investigation of a particular offense.[16] This is the threshold information without which the remaining warnings would become little more than an empty ritual. It tells the suspect that he has something to worry about, so that when he is told immediately thereafter that he does not have to answer questions and that he can talk with a lawyer before deciding whether to answer questions, he understands why he might wish to invoke one or the other of those rights. By the same token, if the suspect decides to make a clean breast of things or to attempt to exculpate himself, he does so with a full appreciation of the consequences.

Obviously, the precise advice that fulfills this threshold requirement in the context of custodial interrogation would make no sense at all when a suspect is being interrogated before the grand jury. He can not be told that he is "under arrest," nor is it adequate to advise him that he is under suspicion by the police. Thus, the requisite advice must be adapted to fit the situation in which it is given. It is not that any specific set of warnings is required by the Constitution; it is that the advice given must be adequate to serve the constitutional purpose for which it is intended – that purpose being to insure that any decision by the suspect to exercise or waive his Fifth Amendment privilege be made knowingly and intelligently.

Before the grand jury, the target witness who appears without counsel may have no idea what the grand jury is investigating or the basis of its interest in him. If he has committed a crime, he may know the extent of his own criminal involvement (although an uncounseled

[16]As noted, the first warning on the P.D. 47, used by police officers in the District of Columbia and borrowed by the prosecutor in this case to advise respondent at the grand jury, advises the suspect that "You are under arrest." (A. 51-52, 61-62).

witness may not even be aware of that), but he ordinarily has no way of knowing that it is *his* criminal involvement, and not the criminality of others, on which the grand jury has focused its investigation. On the other hand, he may not be guilty of any crime, and the prosecution may be silently building its case against him out of his own mouth without his even being aware that he is incriminating himself.[17] If such a witness is not told expressly that the function of the grand jury is to indict persons who are to be criminally prosecuted and that the grand jury has focused on him as a potential target for indictment, it is simply unrealistic to suggest that an *uncounseled* target witness can make "knowing" and "intelligent" decisions with respect to the exercise of his privilege.[18] The so-called "target witness warning" cannot be viewed as simply another layer "on top of full *Miranda* warnings," as

[17]As Mr. Justice Frankfurter, writing for the Court in *Ullmann v. United States*, 350 U.S. 422, 426 (1956), observed:

> Time has not shown that protection from the evils against which [the Fifth Amendment privilege] was directed is needless or unwarranted. This Constitutional protection must not be interpreted in a hostile or niggardly spirit. Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege. Such a view does scant honor to the patriots who sponsored the Bill of Rights as a condition to acceptance of the Constitution by the ratifying States. (Footnote omitted).

Later the same Term, in *Slochower v. Board of Education*, 350 U.S. 551, 557 (1956), Mr. Justice Clark wrote for the Court:

> The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury. As we pointed out in *Ullmann*, a witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances.

[18]This is especially true in respondent's case, where the prosecutor who subpoenaed him to the grand jury appears to have told him only that he was needed "as a witness" in the grand jury's investigation of respondent's two friends. (A. 45). See note 31, *infra*.

petitioner attempts to characterize it, but must be evaluated for what it really is – the essential advice without which any other advice becomes completely ineffectual.

Even assuming that some target witnesses subpoenaed to the grand jury do perceive that they are in jeopardy, that is not an argument against advising such witnesses that they are targeted for indictment. In the case of a witness who is fully knowledgeable of his potential criminal liability and the consequences of answering questions given that liability, it is perhaps true that any advice, including advice that he is a target for indictment, is probably superfluous.[19] But such advice, after all, is designed to inform the ignorant, not the sophisticated; any relaxation of the waiver requirement which would permit finding a valid waiver on the assumption that the target witness probably knew, without being informed, that he was the target of the grand jury, would make the full protection of the Fifth Amendment privilege available only to those who need it least – those who, based on prior experience or advice of counsel, know how and why to invoke it – and deny it to those, like respondent, who are compelled to testify before the grand jury seeking to

[19]The Government makes no claim that it would be overly burdensome to administer warnings to target witnesses. It would be hard pressed to make such an argument in any event. Petitioner concedes that "it is common practice for government attorneys to advise [target witnesses] of their Fifth Amendment privilege." Pet. Br. 19. Petitioner also correctly points out that the premise of the Second Circuit's supervisory holding in *United States v. Jacobs*, 531 F.2d 87 (1976), petition for a writ of certiorari pending, No. 75-1883, was the regular practice of federal prosecutors within that Circuit to give warnings, including "target witness" warnings, to all target witnesses. Moreover, a letter submitted to this Court by the Solicitor General in connection with its consideration of *United States v. Mandujano*, *supra*, indicates that as long ago as 1963 federal prosecutors were advised by the Justice Department to warn target witnesses whom they compelled by subpoena to appear before the grand jury. Respondent contends that such warnings are not simply a matter of prosecutorial largesse, but are the essential underpinnings of a voluntary, knowing and intelligent waiver.

indict them and who appear without counsel and with only the most rudimentary understanding of their rights and how (or why) to assert them.[20] As the Court said in *Miranda* in rejecting a similar contention that a court should be permitted to find a valid waiver based on a subjective judgment that a particular suspect who had not been warned was nevertheless aware of his Fifth Amendment rights:

> The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact. More important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time. 384 U.S. at 468-469 (footnote omitted).

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[20]It is more than a coincidence that both Roy Mandujano and Gregory Washington were indigent criminal defendants who appeared before the grand jury without a lawyer and who, after being indicted by the grand jury based on their own testimony, were *then* given court-appointed counsel to represent them at trial. As this Court recognized in *Miranda*, it is almost always the indigent and the ignorant who most need assistance in understanding and intelligently exercising their Fifth Amendment rights. 384 U.S. at 472. If an affluent citizen were subpoenaed to the grand jury as a target witness, he would of course seek the advice of counsel and make a knowing and intelligent decision to assert or waive his right to silence. The Government suggests that "the recipient of a grand jury subpoena, unlike an arrestee, has an opportunity in advance of questioning to consult with counsel and friends and decide to what extent (if at all) he will respond to questioning" (Pet. Br. 25-26), but if he has no lawyer, and no money with which to afford one, this "opportunity" is of little comfort.

Finally, respondent's position is in accord with that taken by the American Bar Association. Standard 3.6(d) of the A.B.A. Standards for Criminal Justice, *The Prosecution Function* (Approved Draft, 1971), states:

> If the prosecutor believes that a witness is a potential defendant he should not seek to compel his testimony before the grand jury *without informing him that he may be charged and that he should seek independent legal advice concerning his rights.* (emphasis added).

The commentary to standard 3.6 states that this warning is required by "due regard for the privilege against self-incrimination and the right to counsel."[21] Under this Court's decisions, if a putative defendant is under governmental compulsion to incriminate himself, "due regard for the privilege" can mean nothing less than a voluntary, knowing and intelligent waiver of the Fifth Amendment privilege. In concluding that such a waiver had not been demonstrated on this record, the Court of Appeals and the Superior Court were clearly correct in focusing on the fact that respondent was never informed that he was the target of the grand jury which had subpoenaed his testimony.

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[21]Referring to its brief in *Mandujano* at 37-39, petitioner argues here that there is "no Sixth Amendment right to counsel in grand jury proceedings." Pet. Br. 39 n. 16. For this proposition, petitioner relies primarily on *Kirby v. Illinois*, *supra*, which holds that the Sixth Amendment right to counsel does not attach until the formal commencement of a criminal prosecution. But the question is not whether a putative defendant compelled to testify before the grand jury has a right to counsel under the Sixth Amendment; as in *Miranda*, the advice of counsel is essential to protect his Fifth Amendment privilege. And this Court expressly held in *Kirby*, *supra*, that nothing in that case affected the continuing of the vitality of the right to counsel associated with the Fifth Amendment privilege recognized in *Miranda*. 406 U.S. at 687-688. In any event, because respondent was advised, once he was inside the grand jury room, that he could have a lawyer outside the grand jury room, the question of respondent's right to counsel, *vel non*, and the source and scope of any right to counsel, is not squarely presented by this case. See note 28, *infra*.

2. Respondent submits that the two lower courts were also correct in emphasizing that the prosecutor's failure to advise respondent of *any* rights until he was sworn as a witness in front of the grand jury, was another important factor supporting their conclusion that no voluntary, knowing and intelligent waiver had been demonstrated. At that moment, respondent was on the witness stand in a room where the only other people were a court reporter, a prosecutor and the grand jurors who were to be, at one and the same time, his triers of fact and his potential accusers. One can hardly imagine an atmosphere less conducive to a voluntary, knowing and intelligent decision about whether to answer questions or invoke a right not to answer. Yet it was in this environment that respondent was told, for the first time, that he did not have to testify and was then asked whether, in spite of his right to silence, he was willing to answer the prosecutor's questions. Respondent was thus placed in a completely untenable position. If he chose to testify, he ran the risk that the grand jurors would not believe his explanation and indict him (assuming for the moment he knew, without having been told, that he was a target for indictment); if he chose to exercise his privilege and remain silent, he ran the risk that the grand jurors would draw an inevitable but impermissible inference of his guilt merely from his exercise of his constitutional privilege not to testify. It is hardly surprising that both lower courts were unwilling to accept respondent's decision to testify under these circumstances as proof of a truly voluntary waiver of the privilege.

Advising a witness of his privilege for the first time inside the grand jury room not only vitiates the voluntariness of any resulting waiver, it also runs afoul of an independent Fifth Amendment doctrine. It has long been held that the Government may not, directly or indirectly, exact any price for the exercise of the

privilege which makes its assertion costly. Although this principle has been articulated differently and has been recognized in a variety of different contexts,[22] the most closely analogous application is the rule that the prosecutor may not comment on or make evidentiary use of the defendant's decision not to testify at trial or at some earlier stage of the proceedings at which he was privileged to remain silent. *Griffin v. California*, 380 U.S. 609, 614 (1965); *Grunewald v. United States*, 353 U.S. 391 (1957); *Stewart v. United States*, 366 U.S. 1 (1961); *cf. Miranda v. Arizona, supra*, 384 U.S. at 468 n.37; *United States v. Hale*, 422 U.S. 171 (1975); *Doyle v. Ohio*, ____ U.S. ____, 96 S.Ct. 2240 (1976); *compare Raffel v. United States*, 271 U.S. 494 (1926).[23] If the prosecutor waits until the target

[22] *See e.g., Garrity v. New Jersey*, 385 493 (1967); *Spevack v. Klein*, 385 U.S. 511 (1967); *Gardner v. Broderick*, 392 U.S. 273 (1968); *Uniformed Sanitation Men v. Sanitation Comm'r*, 392 U.S. 280 (1968); *Lefkowitz v. Turley*, 414 U.S. 70 (1973); *compare Baxter v. Palmigiano*, ____ U.S. ____, 96 S.Ct. 1551 (1976) (distinguishing this line of decisions on the ground that the prison disciplinary action was not based solely on the prisoners' refusal to answer questions). See also *Slochower v. Board of Education*, 350 U.S. 551, 557-558 (1956), which was decided under the Due Process Clause before *Malloy v. Hogan, supra*, made the Self-Incrimination Clause applicable against the states.

The Court's analysis in *Garrity v. New Jersey, supra*, is especially pertinent here. In that case the summoned police officers, most of whom were represented by counsel, did not assert their privilege and chose instead to answer official questions under a threat of dismissal from the police force if they exercised their right to refuse to answer. The State sought to use the resulting disclosures against the officers in a subsequent criminal prosecution. It was argued by the State that the failure to claim the privilege at the time of the questioning constituted a waiver. The Court rejected that contention outright, concluding that any purported waiver made in consequence of a threat of dismissal could not be considered voluntary. 385 U.S. at 498-499.

[23] Admittedly, some of these decisions—particularly *Grunewald*, *Stewart* and *Hale*—were supervisory. But this Court has never indicated that the fundamental principle epitomized by *Griffin v. California, supra*, 380 U.S. at 614, and *Grunewald v. United States, supra*, 353 U.S. at 425-426 (Black, J., concurring), is of less than constitutional magnitude. Furthermore, it seems clear that this Court does have supervisory authority over the local Article 1 courts of the District of Columbia, and particularly over grand juries of those courts that are conducted by and under the supervision of federal prosecutors. Cf. *Griffin v. United States*, 336 U.S. 705 (1949); *Fisher v. United States*, 328 U.S. 463 (1946).

witness is in front of the grand jury before asking him whether he wishes to assert his privilege or to answer the grand jury's questions, the target witness electing to exercise his privilege will have no choice but to do so in front of the very grand jury that is considering whether he should be indicted. And if a grand jury considering whether to indict a putative defendant can use against him the fact that he refused to testify before that grand jury, an exceedingly high price will have been placed on the exercise of the privilege. An inference of guilt by the grand jury and a resulting indictment would seem to be directly analogous to the situation where the inference is drawn by the petit jury and a criminal conviction results so as to bring this case within the rationale of the line of decisions headed by *Griffin*. Just as the Fifth Amendment would forbid a prosecutor from forcing a defendant at trial to take the stand solely for the purpose of having him refuse to testify in front of the jury, so too – and for the same reason – a prosecutor should not be permitted to put a putative defendant before the grand jury solely for the purpose of having the grand jury, if he exercises his privilege, hear his refusal to testify and use it against him in deciding whether or not to indict him.[24]

[24]If the prosecutor were to call to the stand at trial a witness *other than* the defendant, knowing the witness is likely to assert a testimonial privilege which will reflect adversely on the defendant in the eyes of the jury, the constitutional implications, *vel non*, and the appropriateness or adequacy of any purportedly remedial judicial instructions are less clear. See *Namet v. United States*, 373 U.S. 179 (1963). In the context of this case, however, it would not only be the potential defendant himself whose claim of privilege would be turned against him, but any adverse inference would be drawn by the grand jury out of the presence of any court and in the absence of a lawyer representing the defendant. Accordingly, there would be no way of guaranteeing any effective curative instructions designed to prevent the grand jury from using against a target witness an inference from his exercise of the privilege. Moreover, since courts will not generally look behind an indictment to see what evidence was presented to the grand jury, a reviewing court will not be in a position to guage the extent to which any inference from the defendant's refusal to testify influenced the grand jury's decision to indict. See *United States v. Calandra*, 414 U.S. 338, 344-345 (1974).

The obvious way to avoid these consequences and, at the same time, to insure that a putative defendant subpoenaed to the grand jury is given a full opportunity to exercise the privilege freely and without fear of adverse inferences is to require the Government to advise the putative defendant of his rights *before* he enters the grand jury and is sworn as a witness.[25] If he decides not to answer incriminating questions, or if he asks for an opportunity to consult with counsel before deciding whether or not to testify, he should not be called as a witness and the grand jury should not be advised that he was subpoenaed but exercised his right not to testify.[26] If, on the other hand, the target witness or putative defendant choses to waive his privilege and to answer the prosecutor's questions in front of the grand jury, a reviewing court could be more confident in concluding that the resulting waiver was voluntarily, knowingly and intelligently made.[27]

[25]Assistant United States Attorney Shine, who interrogated respondent before the grand jury, testified below that because of the risk that the grand jury will draw an improper inference, his routine practice, from which he deviated in this case only out of apparent inadvertence or for reasons of convenience, "is to talk to him in my office and advise him of his rights and if he decides that he is not going to testify, then I don't put him in front of the Grand Jury." (A. 59, 63-64).

[26]In some circumstances, for example where the grand jury is already aware that a putative defendant has been subpoenaed, it might be necessary to devise a prophylactic rule requiring the prosecutor to tell the grand jury that he advised the witness of his rights and the witness elected not to testify and to further instruct the grand jurors that they are to draw no inference of guilt against the putative defendant from his exercise of the privilege.

[27]The prosecutor could protect himself and his evidence by having the witness execute a written waiver of the privilege which could be included in the record. Moreover, where the target witness does elect to waive the privilege and testify, nothing would prevent the prosecutor from readvising the witness of his Fifth Amendment rights and establishing the waiver on the record after the witness is called before the grand jury and sworn. This would further strengthen the prosecutor's hand against any later claim by the defendant that the waiver was coerced by the prosecutor in the confines of his office.

Once again, the American Bar Association Standards relating to the Prosecution Function are in accord with respondent's position. Standard 3.6(e) states:

> The prosecutor should not compel the appearance of a witness [before the grand jury] whose activities are the subject of the inquiry if the witness states in advance that if called he will exercise his constitutional privilege not to testify.

The commentary to Standard 3.6 explains that this provision is necessary because "it would dilute and infringe upon the privilege against self-incrimination to require a potential defendant to appear before a grand jury and there claim the privilege when the prosecutor has been told in advance that the witness would do so. Such a tactic is unfair in that the very exercise of the privilege may prejudice the witness in the eyes of the grand jury." Although Standard 3.6(e) does not explicitly state that the warnings required by 3.6(d) must be given out of the presence of the grand jury, that requirement would seem to be implicit in the stated rationale for Standard 3.6(e). Indeed, the two Standards together would have little impact if the requirement to warn the putative defendant and the requirement to protect him from any adverse inference by the grand jurors arising out of his claim of privilege could be easily circumvented by the simple expedient of delaying the warnings until the putative defendant was before the grand jury.

Whether or not advising the target witness outside the presence of the grand jury should always be required as an essential prerequisite of an effective waiver, the Court of Appeals and the Superior Court were clearly correct in viewing the time and place of the advice given to respondent as one factor to be considered in determining whether his purported waiver was voluntary, knowing and intelligent. Adding these factors together, including the failure to advise respondent that the grand jury had

focused on him as a potential target for indictment, the holding of the Court of Appeals (and the Superior Court) that respondent's uncounseled decision to answer the grand jury's questions did not measure up to the constitutional standard for a valid waiver was a sound one and should not be reversed.[28]

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[28] Because respondent was advised, once he was inside the grand jury, that he had a "right to remain silent" and a right to an appointed lawyer "outside the Grand Jury room" while he testified (A. 3-4), this case does not squarely present the question of whether those rights or those warnings are essential to a knowing and intelligent waiver of the Fifth Amendment privilege. Respondent would point out, however, that although the grand jury generally has a right to everyman's testimony (*Branzburg v. Hayes*, 408 U.S. 665, 688 (1972)) and although ordinary witnesses have a corresponding duty to answer the grand jury's questions unless they reasonably fear such answers may tend to incriminate them, putative defendants, for the reasons we have shown, are different. With respect to someone who is the target of the grand jury, virtually all of the grand jury's questions are incriminating–indeed, their purpose is to incriminate–and it would seem that only an absolute right to silence would adequately protect the privilege in this context, at least absent a showing by the Government to a supervising court that the witness' claim of privilege with respect to certain questions was overbroad. Moreoever, a defendant's absolute right to remain silent at trial "might be practically nullified" (*Michigan v. Tucker, supra*, 417 U.S. at 441) if the privilege were not given a coextensive scope when the defendant is compelled to testify as a "putative" defendant before the grand jury.

This Court has not defined the extent to which a putative defendant has a "right to counsel" before the grand jury, nor has it clarified the source of any such right. Presumably, under *Kirby v. Illinois, supra*, the putative defendant would not have a right to counsel derived from the Sixth Amendment because a criminal prosecution would not have been formally initiated, although, as in this case, if an uncounseled putative defendant is compelled to incriminate himself before the grand jury, criminal prosecution will not be far behind. Quite apart from the Sixth Amendment, however, the Court made it clear in *Kirby* that the Fifth Amendment privilege was not implicated in that case, and it expressly reaffirmed the right to counsel associated with the Fifth Amendment recognized in *Miranda*. 406 U.S. at 687-688. Moreover, the scope of any right to counsel is necessarily related to the scope accorded to the privilege. If putative defendants compelled to testify under oath before the grand jury are not protected by a right to silence, but have only the right to refuse to answer specific questions which they feel will tend to incriminate them, then the need for the guiding hand of counsel is particularly acute. As this Court said in *Maness v. Meyers*, 419 U.S. 449, 468-469 (1975):

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II.

COMPELLING A TARGET WITNESS TO APPEAR BEFORE THE GRAND JURY AND INTERROGATING HIM THERE UNDER OATH WITHOUT INFORMING HIM THAT THE GRAND JURY HAS FOCUSED ON HIM AS A TARGET FOR INDICTMENT AND MAY, IF HE TESTIFIES, USE HIS OWN TESTIMONY AS A BASIS FOR INDICTING HIM VIOLATES THE DUE PROCESS CLAUSE.

In refusing to allow the Government to use respondent's own grand jury testimony against him at his criminal trial, the Court of Appeals based its decision on the Self Incrimination Clause and the cases decided thereunder and did not rely on the Due Process Clause. Respondent believes, however, that either clause provides this Court with an adequate ground for

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(footnote continued from preceding page)

> The assertion of a testimonial privilege, as of many other rights, often depends upon legal advice from someone who is trained and skilled in the subject matter, and who may offer a more objective opinion. A layman may not be aware of the precise scope, the nuances, and boundaries of his Fifth Amendment privilege. It is not a self-executing mechanism; it can be affirmatively waived, or lost by not asserting it in a timely fashion.
>
> * * *
>
> The witness, once advised of the right, can choose for himself whether to risk contempt in order to test the privilege before evidence is produced. That decision is, and should be, for the witness. But, if his lawyer may be punished for advice so given there is a genuine risk that a witness exposed to possible self-incrimination will not be advised of his right. Then the witness may be deprived of the opportunity to decide whether or not to assert the privilege.

If the risk of contempt for erroneous advice may prevent a lawyer from providing a witness with requisite advice regarding his Fifth Amendment privilege, then not having a lawyer at all poses an even greater threat to the free and intelligent exercise of the privilege. At the very least, it would seem that indigent putative defendants who are subpoenaed to testify before the grand jury should have a right to consult with a lawyer before they are required to exercise or waive their Fifth Amendment privilege and should be advised that they have such a right.

decision; indeed, regardless of the stated rationale, it seems clear that most courts which have faced the question presented by this case have been struck by the patent unfairness of subpoenaing a witness whom the grand jury is likely to indict and interrogating him under oath before that very grand jury without telling him even that he is a potential target for indictment.[29]

The unfairness of not advising a target witness that he is a potential defendant would be especially harsh if this Court were to accept petitioner's argument that even a grand jury target witness is not "compelled" to incriminate himself within the meaning of the Fifth Amendment unless he asserts his privilege and is somehow forced to testify despite his expressed desire to remain silent. If an uncounseled target witness' failure to claim the privilege at the grand jury were automatically to disqualify him from later interposing a Fifth Amendment objection to the Government's use against him at trial of testimony he gave at the grand jury under the compulsion of a subpoena, the Due Process Clause should be held to require, at the very least, advising the target witness at the grand jury that he may be indicted by that grand jury, that he therefore has a right to refuse to answer the grand jury's questions and that if he answers questions

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[29] Petitioner suggests that respondent's contention is that the mere calling of potential defendants to testify before the grand jury creates the unfairness giving rise to the due process violation (Pet. Br. 42), but that is not respondent's contention. This Court appears to have held that potential defendants may be called to testify before the grand jury. *United States v. Dionisio, supra*, 410 U.S. at 10 n. 8 (1973). What is unfair is compelling such persons to appear and testify without counsel and without telling them they are potential defendants who might, for that reason, legitimately wish to refuse to testify on Fifth Amendment grounds.

without asserting that right he will not later be heard to claim that his Fifth Amendment rights were violated.[30]

The situation here is thus almost the converse of *Doyle v. Ohio*, ____ U.S. ____, 96 S.Ct. 2240 (1976), and the considerations of fundamental fairness in both cases compel the same result. In *Doyle* this Court held that the Due Process Clause is violated when a criminal defendant is told by the police that he has a right to remain silent and the Government later attempts to impeach his purportedly exculpatory trial testimony with the fact that he remained silent when questioned about the same matters by the police. Here the Government claims the right to use the defendant's own grand jury testimony against him at trial (presumably in its case-in-chief) because, according to the Government, his failure to invoke the privilege when he was questioned at the grand jury as a target witness pursuant to subpoena means that he was not "compelled" within the meaning of the Fifth Amendment. Yet respondent was never told at the grand jury the basis on which he might intelligently chose to exercise the privilege, much less the fact that a failure to claim it would operate as a permanent bar to its

[30]The Government argues–somewhat disengenuously, we submit–that "even a witness [who] is a prime target . . . may wish to confess his part in the offense" and suggests that there is nothing "fundamentally unfair for the Government to have summoned and questioned the witness without giving a 'putative defendant' or 'target' warning." Pet. Br. 44. The short answer to this contention is that those who truly want to confess would not be deterred by simple warnings, would freely execute a valid waiver and would not later complain of unfairness. Accordingly, in such cases neither the due process nor the self-incrimination issue would arise. Cf. *Garrity v. New Jersey*, *supra*, 385 U.S. at 499.

later assertion.[31] Nor did respondent have the benefit of counsel to explain to him at the grand jury the nature of the privilege or the consequences of a failure to exercise it.

The fact that respondent appeared at the grand jury without counsel and the fact that he was never told that the reason he was subpoenaed was to enable the grand jury to decide, after hearing his testimony, whether or not to indict him are, of course, critical to the resolution of due process questions presented by this case. In *United States v. Kordel*, 397 U.S. 1 (1970), along with their Fifth Amendment self-incrimination claim, the respondents also argued that the procedure whereby the Government had obtained from them in a civil proceeding information which it later used against them in a criminal prosecution violated their right to due process. In rejecting this argument, Mr. Justice Stewart, writing for the Court, noted:

> We do not deal here with a case where the Government has brought a civil action solely to obtain evidence for its criminal prosecution or has failed to advise the defendant in its civil proceeding that it contemplates his criminal

[31]Although respondent does not contend that he was deliberately misled into believing that he was *not* a target of the grand jury, under the circumstances he might reasonably have believed that he was not. Respondent knew that his two friends had been arrested and were under investigation by the grand jury. The prosecutor who handed respondent the grand jury subpoena testified that he thought he recalled telling respondent "that he would be needed *as a witness* [in the grand jury's investigation of the other two men] and I would give him a subpoena." (Emphasis added) (A. 45). And, once respondent was inside the grand jury room and sworn as a witness, the prosecutor conducting the grand jury assured him that "You are not under arrest. You're *just* here by way of subpoena." (Emphasis added) (A. 3). It is submitted that what he should have said was "You are not under arrest. You should understand, however, that this grand jury's job is to decide whether you should be indicted for stealing the motorcycle found in your van, and if you are indicted you will be prosecuted for that offense."

> prosecution; nor with a case where the defendant is without counsel . . . 397 U.S. at 11-12 (footnotes omitted).

In contrast to *Kordel*, each of the enumerated due process factors is present here: the sole purpose of putting respondent before the grand jury was to determine whether, after hearing his testimony, the grand jury would indict him and, if so, to obtain evidence that the Government would seek to use in the resulting criminal prosecution (A. 48, 57-58); respondent was never told that the Government or the grand jury was contemplating indicting and prosecuting him; and respondent appeared at the grand jury without counsel and answered the grand jury's questions without the advice of counsel.[32]

Finally, if the Government's broadest position here and in *Mandujano* were to find acceptance, the due process considerations would be even more compelling. Although respondent was advised, at least by the time he was in front of the grand jury, that he had a right to refuse to answer the grand jury's questions and a right to consult with counsel, the Government has argued here and in *Mandujano* that he was not even entitled to

[32]The presence of counsel in *Kordel* was also highly relevant to the Court's disposition of the self-incrimination question presented by that case. As this Court noted in *Garner v. United States*, *supra*, 424 U.S. at 653, *Kordel* is the only case which actually holds that a witness must ordinarily claim the privilege before "testifying" or he will be barred from later asserting it. In reaching that result, however, the Court was careful to point out that "[t]he respondents do not suggest that [the witness], who answered the interrogatories on behalf of the corporation [without asserting the privilege], did so while unrepresented by counsel or without appreciation of the possible consequences." 397 U.S. at 10. It is one thing to require a knowledgeable witness with legal counsel to claim the privilege or forego it; it is another matter to impose such burdens on indigent putative defendants who respond dutifully to grand jury subpoenas without the benefit of counsel. It is significant that, like the witness in *Kordel*, none of the other witnesses in the line of cases headed by *United States v. Monia*, 317 U.S. 424 (1943), including Monia himself, were uncounseled indigents. See note 20, *supra*.

that much. According to the Government, target witnesses or putative defendants are entitled to no advice whatever; they can be subpoenaed to the grand jury and interrogated under oath without counsel and without being told either that they may be indicted by that grand jury or that they have a constitutional right not to answer the grand jury's incriminating questions. While conceding that such witnesses have an absolute right to refuse to answer each and every one of the grand jury's questions relating to their possible criminal activities, the Government would apparently prefer to be able to interrogate uncounseled target witnesses at the grand jury under the compulsion of a subpoena without telling them anything at all about their constitutional rights.[33] Neither the adversary system nor the Due Process Clause will tolerate such patently unfair practices on the part of the Government.

[33]As mentioned earlier (note 19, *supra*), Government attorneys conducting federal grand juries apparently make it a practice to administer warnings to witnesses whom they consider to be targets of the grand jury. Thus, the only substantial interest the Government seems to be asserting here (and in *Mandujano*) is the right to decide for itself which uncounseled target witnesses it will warn and which ones it will require to fend for themselves. Respondent's position, of course, is that the Constitution, as interpreted by this Court, has wisely taken that power out of the prosecutor's hands.

III.

ACCEPTANCE OF RESPONDENT'S POSITION WILL NOT SERIOUSLY IMPEDE THE EFFECTIVE FUNCTIONING OF THE GRAND JURY, WHICH ALREADY HAS AMPLE MEANS OF SECURING NECESSARY TESTIMONY FROM RELUCTANT WITNESSES, INCLUDING, MOST NOTABLY, THE AVAILABILITY OF "USE" IMMUNITY AUTHORIZED BY 18 U.S.C. 6002, *ET SEQ.*

This is not a case in which the needs of law enforcement and the interests protected by the Fifth Amendment can not be harmonized. Under an analysis premised either on the Due Process Clause or the Self-Incrimination Clause, acceptance of respondent's position will not seriously impede the effective functioning of the grand jury or deprive the grand jury of evidence obtainable only from persons who may themselves be involved in or at the fringes of crime.

As if to acknowledge that its legal arguments are on shaky ground, petitioner accents its brief with familiar policy arguments suggesting that if this Court imposes a requirement that target witnesses be advised, prior to testifying, that they are targets of the grand jury and that they have a right not to answer incriminating questions, grand juries will be deprived of evidence essential to their task and, because crime will therefore go undetected or unprosecuted, society will be the worse for it. Thus, the Government sounds at the outset the theme that is to be replayed many times throughout its brief:

> It is common to call as grand jury witnesses individuals who are known or suspected to be involved in or at the fringes of the criminal activity under investigation (such persons are, after all, likely to be in the best position to supply relevant evidence); it is also common in the case of most such witnesses, for a variety of reasons, that there is no intent to prosecute, particularly if they are cooperative with the grand jury. The effective functioning of the grand jury would be seriously impeded by requiring administration of warnings designed to inhibit the testimonial cooperation of such witnesses. Pet. Br. 13-14.

These arguments from necessity are not new, nor are they totally without merit. All law-abiding citizens have a stake in the effective functioning of the grand jury in the ongoing battle against crime. The short answer to these considerations, however, was provided in *Miranda* itself, 384 U.S. at 479.

> A recurrent argument made in these cases is that society's need for interrogation outweighs the privilege. This argument is not unfamiliar to this Court. See, *e.g.*, *Chambers v. Florida*, 309 U.S. 227, 240-241 (1940). The whole thrust of our foregoing discussion demonstrates that the Constitution has prescribed the rights of the individual when confronted with the power of government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself. That right cannot be abridged.

But there is another complete answer to petitioner's stated concerns. Petitioner paints a picture of target witnesses trooping into the grand jury, receiving advice as to their Fifth Amendment rights and refusing to testify, thereby depriving the grand jury of essential information, including information about others in-

volved in criminal activities.[34] What petitioner fails to mention, however, is that Congress, in response to this very problem, has provided the complete solution in 18 U.S.C. §6002, *et seq.*[35] Thus, even if petitioner were correct that providing Fifth Amendment advice would inhibit target witnesses from cooperating with the grand jury, the grand jury is not forced simply to shrug its shoulders and make do without such testimony; the prosecutor need only apply to a judge for an order pursuant to 18 U.S.C. §6003, after which the testimony of the witness is properly compellable subject to the use immunity provision of 18 U.S.C. §6002. Moreover, even if the Government decides to prosecute the witness, its original decision to grant the witness

[34] The assumption that any target witness who is informed of his rights will elect not to testify may be slightly exaggerated. There is no reason not to assume that at least some target witnesses, after being given adequate Fifth Amendment advice, would execute perfectly valid waivers of their Fifth Amendment rights. In such cases the Government will have lost nothing by giving the advice and will have insulated the resulting testimony from subsequent Fifth Amendment challenges. More importantly, however, what the Government's policy argument really boils down to is the complaint that if it has to tell uncounseled target witnesses what their constitutional rights are, some of those witnesses are going to exercise those rights. It seems to respondent that there could hardly be a more compelling argument in favor of a means for assuring that target witnesses who elect to waive their Fifth Amendment privilege do so with a meaningful understanding of what they are giving up.

[35] In tracing the history of this statute and its predecessors in *Kastigar v. United States, supra,* 406 U.S. at 445-447, the Court made several observations which are pertinent to petitioner's arguments here.

> Immunity statutes, which have historical roots deep in Anglo-American jurisprudence, are not incompatible with [the values which underlie the Fifth Amendment privilege]. Rather, they seek a rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify. The existence of these statutes reflects the importance of testimony, and the fact that many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime. Indeed, their origins were in the context of such offenses, and their primary use has been to investigate such offenses (footnotes omitted).

See also *Lefkowitz v. Turley, supra,* 414 U.S. at 78-79, 81-82.

immunity would not be a bar to subsequent prosecution either for the substantive offenses about which he testified or other offenses.[36] This Court has held that the "use and derivative use" immunity conferred under 18 U.S.C. §6002 is coextensive with scope of the privilege against self-incrimination. *Kastigar v. United States, supra,* 406 U.S. 441. Thus, the Government would merely have to demonstrate in any subsequent prosecution that its case was not built on the testimony (or the fruits of the testimony) compelled pursuant to the grant of immunity, but rested instead on a wholly independent foundation. *Id.* at 460; *Murphy v. Waterfront Comm'n, supra,* 378 U.S. at 79 n.18; see *United States v. DeDiego,* 511 F.2d 818 (D.C. Cir. 1975).

The ready availability of statutory immunity is such an obvious solution to the Government's stated concerns, one suspects that losing the testimony of target witnesses about *others* involved in crime is not the Government's real concern.[37] If what the Government is really worried about is losing the compelled self-incriminating testimony of uncounseled target witnesses – testimony which it is now able to get from target witnesses who are ignorant of their rights – there can be only one response; the Government seeks precisely what the Fifth Amendment protects.

[36] Even after a grant of immunity pursuant to section 6002, the witness can, of course, be prosecuted for perjury if he lies to the grand jury. 18 U.S.C. §6002; 18 U.S.C. §1623. If, on the other hand, the witness continues to refuse to testify, he can be held in contempt. 18 U.S.C. §6002. See also, 18 U.S.C. §401; 28 U.S.C. §1826.

[37] The availability of immunity also exposes the weakness of the Government's so-called subjective test for determining who is a "putative defendant." The Government argues that if it must tell any witnesses what their Fifth Amendment rights are, it should only be those whom it subjectively intends to indict, and not those whose criminal involvement and potential self-incrimination are known to the Government, but who are not presently candidates for indictment and are needed by the grand jury solely to provide evidence against others. Pet. Br. 49-52. But since the Government can always immunize those witnesses whom it needs solely

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The Government cannot have it both ways. It cannot use the compulsion of a judicial subpoena to extract self-incriminating testimony from an uncounseled putative defendant without a grant of immunity and in violation of his Fifth Amendment rights and then use that testimony to indict and prosecute the putative defendant himself. Those are the terms dictated by our adversary system and by the Fifth Amendment privilege, which this Court has called "an important advance in the development of our liberty – 'one of the great landmarks in man's struggle to make himself civilized.'" *Ullmann v. United States*, 350 U.S. 422, 426 (1956), quoting from Griswold, The Fifth Amendment Today (1955), 7.

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for the information they have about others, it has everything to gain and nothing to lose by properly advising all such witnesses of their Fifth Amendment rights. Respondent believes that the proper test is the one which emerges naturally from this Court's analysis in *Garner v. United States*, *supra*; when the Government uses compulsion to obtain self-incriminating testimony from those who it knows are likely to incriminate themselves by giving such testimony, it must first make sure that the targets of such compulsion understand that they have a right not to answer incriminating questions. In any event, as petitioner appears to concede (Pet. Br. 50 n. 23 and 51), respondent was a putative defendant under any test, and the desirability of one test or another in the abstract should have no bearing on the outcome of this case.

CONCLUSION

For the foregoing reasons, respondent respectfully submits that the judgment of the District of Columbia Court of Appeals should be affirmed.

Respectfully submitted,

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